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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

EDGAR JAVIER GARCIA
ROSAS et al.,

Plaintiffs and Respondents.

v.

JEFF PODELL, as Trustee, etc.,
et al,

Defendants and Appellants.

2d Civ. No. B288586
(Super. Ct. No. 56-2016-
00478626-CU-CO-VTA)
(Ventura County)

Edgar Javier Garcia Rosas and Jeannet I. Valencia (collectively “plaintiffs”) brought this action for breach of contract and fraud against Jeff Podell and Alyssa Shimotakehara (collectively “defendants”), as trustees of the S&P Trust dated May 26, 2009 (Trust). Plaintiffs, who purchased real property from the Trust, contend defendants failed to disclose material defects in the property.

Following a three-day bench trial, the trial court entered judgment for plaintiffs. It awarded them the full amount

requested (\$22,509.97) and denied their request for punitive damages. Defendants, who are self-represented, contend the trial court erred by awarding plaintiffs \$12,500 to repair a cinderblock wall, to relocate a gate and replace a fence, and to repair damage to the driveway caused by the fence demolition. They do not contest the \$10,000 awarded to repair a leak in the master bathtub. After considering each of defendants' arguments, we affirm.

FACTS AND PROCEDURAL BACKGROUND

In October 2012, Shimotakehara purchased residential property located on Verdemont Circle in the City of Simi Valley (City). She subsequently transferred title to the property to the Trust. The property is within the Oakridge Estates Homeowners' Association (HOA).

During an extensive remodel of the property, defendants installed a gate on the driveway with a solid fence leading from the edge of the gate up to a cinderblock wall that runs parallel to the adjoining neighbor's property. This enabled defendants to park their recreational vehicle behind the gate. Defendants also extended the height of the cinderblock wall. Podell performed the work on the wall and fence with the assistance of an unlicensed mason. Defendants bought rebar to reinforce the cinderblock wall, but it was not installed. Podell assumed the rebar had been installed and acknowledged the mason "obviously misled me."

On August 5, 2014, Palma Garcia, a representative of the HOA, mailed a letter to defendants at the property's address advising that their modifications required the HOA's approval and "possibly the necessity of permits from the City." The letter stated that the "project(s) must cease until you have submitted your request(s) and plans." Defendants did not submit any home improvement plans to the HOA's Architectural Review

Committee for approval. An HOA board member reported the construction to the City. Rather than fine defendants, the HOA chose to let the City handle the matter.

On August 18, 2014, Trinece Bandy, a Code Enforcement Officer with the City's Department of Community Services, mailed a letter to defendants at the property's address advising that the City had received a complaint "that a wall exceeding the maximum allowed height is being maintained on your residential property Please be aware that Section 9-30.050 of the Simi Valley Municipal Code (SVMC) states that no solid fence, wall, or hedge shall exceed 42 inches in height and no see-through fence may exceed six feet within the front yard setback area (measuring 20 feet from the front property line). . . . In addition, Section 9-30.050.E SVMC requires that gates for vehicles on driveways or roadways shall be set back a minimum of 20 feet from the front yard property line." The City gave defendants one year to bring the property into compliance.

Less than a year from the date of Bandy's letter, plaintiffs entered into a purchase and sale agreement with defendants, as trustees of the Trust. Although plaintiffs agreed to purchase the property "as is," the agreement required that defendants provide a full and complete disclosure of all known material facts and defects affecting the property, including any adverse conditions, and to make any and all other disclosures required by law.

Before escrow closed on May 29, 2015, plaintiffs asked defendants whether they had obtained permits for the construction performed on the property. Plaintiffs were told that everything was in order. Defendants did not disclose any issues with the cinderblock wall, gate or fence. They claim they never received the letters from the HOA and the City.

The day after plaintiffs moved in, Valencia took a shower in the upstairs master bathroom. Rosas, who was in the kitchen, heard a dripping sound in the ceiling. Plaintiffs discovered the bathtub had a leak that allowed water to penetrate into the subfloor of the master bathroom above the kitchen. Neither the parties' real estate agents nor plaintiffs' professional home inspector noticed the cracks in the tub prior to close of escrow. When told about the leak, defendants responded, "That's something new, we [didn't] notice that before."

On July 27, 2015, the City's Code Enforcement staff sent a letter to plaintiffs regarding their violation of SVMC section 9-30.050. The letter advised "that a wall exceeding the maximum allowed height of 42 inches is being maintained on your residential property" and gave plaintiffs until August 27, 2015 to abate the violation. Plaintiffs received an extension to November 1, 2015 to comply with the directive.

Plaintiffs subsequently presented the City with plans for removing the existing solid fence, moving the gate back and replacing the former solid fence with a see-through wrought iron fence. The City approved the plans and the work was performed. The City's field inspection on November 2, 2015 "revealed violation abated."

Plaintiffs also discovered that the cinderblock wall adjacent to the neighbor's property was unsafe because, during construction, defendants had placed blocks on top of blocks with no rebar supports. According to the neighbor's tenant, the wall, which is cracked, moves when you shake it and could topple over.

Plaintiffs incurred \$4,000 to relocate the gate and replace the original fence, \$4,100 to repair the damage to the driveway from the fence demolition, \$4,400 to repair the cinderblock wall and \$10,009.97 for the purchase and installation of a new master

bathroom tub. The total amount sought was \$22,509.97. Defendants refused plaintiffs' requests to reimburse them for these costs.

Plaintiffs brought claims for breach of contract and fraud against defendants. They requested damages based on defendants' failure to disclose the leak in the master bathtub, their illegal construction of the outside gate and fence, and their intentional concealment of the defective conditions.

Garcia, Bandy, defendants' real estate agent, the neighboring tenant, and the parties testified at trial. Following post-trial briefing, the trial court issued its decision. It found that the gate and original fence did not comply with local codes and ordinances, that the cinderblock wall was not built in compliance with applicable building codes and City regulations, and that the gate, fence and wall were constructed without the required authorization from the HOA.

The trial court concluded that defendants had breached the purchase and sale agreement and committed fraud by making misleading and inaccurate statements in their written disclosure forms and also in their responses to oral questions posed by plaintiffs. Accepting plaintiffs' calculation of damages, the trial court entered judgment against defendants in the amount of \$22,509.97, plus attorney fees to be determined by post-judgment motion.¹

DISCUSSION

Defendants do not challenge the \$10,009.97 in damages awarded for the leak in the master bathtub. Their appeal is limited to the \$12,500 awarded for the relocation of the gate and

¹ The trial court subsequently awarded plaintiffs \$19,000 in attorney fees.

replacement of the fence, the repair of damage to the driveway caused by the fence demolition and the repair of the cinderblock wall.

Denial of Defendants' Request to Recall Bandy

Plaintiffs called Bandy to testify on their behalf. She testified that on August 18, 2014, she mailed a letter to defendants advising that the placement of the gate and fence in their front yard violated SVMC section 9-30.050, which states that “no solid fence, wall, or hedge shall exceed 42 inches in height and no see-through fence may exceed six feet within the front yard setback area (measuring 20 feet from the front property line).” The letter further advised that SVMC “[s]ection 9-30.050.E . . . requires that gates for vehicles on driveways or roadways shall be set back a minimum of 20 feet from the front yard property line.”

Bandy conducted a field inspection of the property in August 2014. That inspection “revealed [an] illegal wall/fence in front yard set back [*sic*].” Bandy determined that the front gate and fence were built without a permit, and that the fence was too high and too close to the sidewalk in the setback area. Bandy’s letter gave defendants one year to abate the violation. When Bandy returned to the property on May 11, 2015, she noted the violation had not been abated.

Podell cross-examined Bandy. At no point did he elicit testimony that the front property line should have been measured from the street curb rather than from the sidewalk. A week after Bandy had been excused from trial, Podell asked the trial court if he could recall Bandy now that “we’ve done measurements.” Noting that the trial was supposed to finish that day, the court stated, “If you wanted her to be here, you had all weekend to give her a subpoena, and you didn’t do it.” Podell

claimed that defendants just discovered the issue, but the court noted that “[w]e were talking about this last week.” Podell responded, “It’s okay.”

Evidence Code section 778 provides: “After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave may be granted or withheld in the court’s discretion.” Defendants maintain the trial court abused its discretion by prohibiting them from recalling Bandy. It is not clear from the record, however, that defendants preserved an objection to the court’s ruling. After the court explained its reasons for denying their request, Podell said, “It’s okay.”

Even assuming an objection was preserved, the trial court’s reasons for denying the request were sound. Bandy was examined by both sides and excused by the court on July 25, 2017. The next day of trial was scheduled for August 2. This gave defendants a week to subpoena Bandy’s appearance at what was expected to be the final day of trial. They failed to do so. In addition, evidence regarding the length of the front yard setback was a primary focus of Bandy’s trial testimony. Defendants claim the evidence regarding the curb was newly discovered, but there was nothing preventing them from exploring this issue during Bandy’s cross-examination.

The trial court also did not abuse its discretion by denying defendants’ request to introduce Bandy’s post-testimony email into evidence. (See *Zanone v. City of Whittier* (2008) 162 Cal.App.4th 174, 190 [exclusion of evidence reviewed for abuse of discretion].) According to defendants, the email clarifies that the front yard property line is measured from the curb, rather than from the sidewalk. Their position is that if the setback is measured from the curb, the original gate and fence were more

than 20 feet from the front property line and thus in compliance with the City's requirements. Plaintiffs objected to the email as hearsay, and the court sustained the objection. The email was offered for the truth of the matter asserted, and defendants failed to show that an exception to the hearsay rule applies. (See Evid. Code, § 1200.)

In any event, Bandy's email did nothing more than reiterate the City's requirement that for residential property within a Traffic Safety Sight Area (TSSA), "no fences, walls, or hedges over 36 inches high measured from the top of the nearest street curb (street level, if no curb) are allowable without a permit authorized by law." This requirement is irrelevant here since there was no evidence that plaintiffs' property is located within a TSSA.

Plaintiffs' Alleged Failure to Mitigate Damages

Defendants contend that plaintiffs failed to mitigate their damages. Specifically, they claim that instead of moving the gate and replacing the front yard fence, at a cost of \$8,100, plaintiffs could have simply and inexpensively reduced the height of existing fence.

Defendants bear the burden of proving plaintiffs' failure to mitigate damages, i.e., what measures plaintiffs could have taken but chose not to take. (Evid. Code, § 600; *Agam v. Gavra* (2015) 236 Cal.App.4th 91, 111.) "The duty to mitigate damages does not require an injured party to do what is unreasonable or impracticable." (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691.)

It is undisputed that the City sent plaintiffs a letter stating they were in violation of SVMC sections 9-30.050 and 9-30.050.E because their front yard fence was too high to be within the 20-foot setback and because their gate was within that same

setback. The City gave plaintiffs only one month to remediate the violation. After obtaining a brief extension of time, plaintiffs submitted plans to the City proposing to demolish the old solid fence, to move the existing gate back toward the house and to construct a new see-through fence between the gate and cinderblock wall. City officials approved the plans and at no point did they advise plaintiffs that the proposed work was unnecessary. To the contrary, once the work was performed, the City deemed the violation abated.

The only evidence that this work was unnecessary was from Podell, who testified that the height of the solid fence could have been lowered to comply with the City's requirements. Defendants provided no expert testimony, such as from a contractor or engineer, that such a remedy would have been feasible or practical. Nor did they produce expert evidence that plaintiffs' decision to demolish the old fence, to move the existing gate and to erect a new fence, at a total cost of \$8,100, was unreasonable under the circumstances.

Plaintiffs' Failure to Allege Defects in the Cinderblock Wall

As a general rule, "[t]he pleadings establish the scope of an action and, absent an amendment to the pleadings, parties cannot introduce evidence about issues outside the pleadings.' [Citation.]" (*Schweitzer v. Westminster Investments, Inc.* (2007) 157 Cal.App.4th 1195, 1214 (*Schweitzer*)). Defendants contend plaintiffs are not entitled to damages for the undisclosed defects in the cinderblock wall because they did not seek such damages in their complaint.

It is true that plaintiffs' complaint does not specifically allege any defects in the construction of the cinderblock wall. At trial, however, plaintiffs introduced evidence of such defects.

Instead of objecting to the admission of this evidence, defendants sought to rebut it.

Code of Civil Procedure section 469 provides that “[v]ariance between the allegation in a pleading and the proof shall not be deemed material, unless it has actually misled the adverse party to his or her prejudice in maintaining his or her action or defense upon the merits.” As explained in *Schweitzer, supra*, 157 Cal.App.4th at page 1214, this statute “precludes a party from complaining about a variance between the pleadings and the proof at trial for the first time on appeal when there was no objection lodged at trial [citation]” (Italics omitted.) Thus, in the absence of an objection at trial, defendants may not claim prejudice as a result of the complaint’s omission of allegations regarding defects in the cinderblock wall.

DISPOSITION

The judgment is affirmed. Plaintiffs/respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Rocky J. Baio, Judge
Superior Court County of Ventura

Jeff Podell and Alyssa Shimotakehara, in pro. per, for
Defendants and Appellants.

Forry Law Group and Craig B. Forry, for Plaintiffs and
Respondents.